U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: January 20, 1995
CASE NO. 92-JTP-17

IN THE MATTER OF

STATE OF FLORIDA, DEPARTMENT OF
LABOR AND EMPLOYMENT SECURITY,

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DENYING REQUEST FOR RECONSIDERATION

Counsel for the State of Florida, Department of Labor and Employment Security (State) has requested that I review and reconsider my decision issued December 5, 1994. In that decision I reversed the Administrative Law Judge's (ALJ) Decision and Order (D. and 0.) of May 2, 1994, and affirmed the Grant Officer's disallowance of $961,003 resulting from the excess profits accumulated by the State charged to its Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1791 (1988), grants.

I note that generally, reconsideration is disfavored, INS v. Doherty, 112 S. Ct. 719. 724 (1992), and should be granted only to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). The JTPA language at Section 168(a)(3), 29 U.S.C.§ 1578(a)(3), however, could be interpreted as requiring a

party seeking judicial review of a Secretary's final order to specifically and timely urge all objections before the Secretary, prior to filing an appeal. Therefore, I have reviewed the State's request for reconsideration in light of the case record.

The State's request for reconsideration is denied.

DISCUSSION

A. The Burden of Production.

The ALJ determined that the Grant Officer failed to meet the burden of production pursuant to 20 C.F.R. § 629.57(i)(1988), because he relied on the wording of a single contract to conclude that 250 other contracts executed during a given time period between similar parties likewise violated the regulations governing fixed unit cost contracts. [1/] D. and 0. at 6. However, four other fixed unit cost contracts were introduced into evidence during the hearing by the State's counsel and averred to as representative of the 250 contracts at issue in this case. Transcript (Tr.) at 22-23. The ALJ, prior to issuing his decision, determined that the proffered contracts were "satisfactory to decide the issues involved in this audit." ALJ's Corrected Order Denying Motion to Admit, issued Dec. 2, 1993, at 2. [2/]

[1/] See also 20 C.F.R. § 627.802(e)(1993).

[2/] In that Order, the ALJ denied the Respondent's request to read as adverse to the Complainant all of the contracts which were not produced during discovery as required.

The regulations governing an ALJ's decision require that "[t]he decision of the ALJ shall be based upon the whole record. It shall be supported by reliable and probative evidence." 29 C.F.R. § 18.57(b)(1993). I found that the documentary evidence in the record, consisting in part of the Administrative File and the representative contracts, satisfied the Grant Officer's burden of production. See State of Maine v. U.S. Dep't of Labor, 669 F. 2d 827 (1st Cir. 1982). "A party will have satisfied his burden of production if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established (emphasis supplied)." Id. at 830.

B. The Burden of Persuasion.

The State had the burden of persuasion to prove that the balance of the contracts it had in its possession, [3] in some 40 or 50 boxes, Tr. at 21-22, in fact complied with the regulations. The State did not introduce into evidence those other contracts, nor any summary or sample thereof. It is a fair inference, therefore, to conclude that the balance of the extant contracts were, as stated by the State's counsel, essentially no different from the contracts introduced into evidence.

On reviewing the contracts in the record, it is evident that they provide generally for placement activities, including placement without training, and not for training in specific

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[3] The State apparently destroyed the contracts from Program Years 1983-1985. See ALJ's Corrected Order Denying Motion to Admit at 2.

occupations at agreed upon wage rates. Thus, they do not satisfy the regulatory requirements for fixed cost contracts. The regulation at 20 C.F.R. § 629.38(e)(2)(1991) [4] which governs the acceptability of single unit charge (fixed unit cost) contracts as exceptions to the statutory limitation on administrative expenditures, [5] must be strictly construed. Texas Dep't of Commerce and Fort Worth Consortium v. U.S. Dep't of Labor, Sec. Dec. and Order, Nov. 1, 1993, slip op. at 2-10, appeal docketed, No. 93-5543 (5th Cir. Nov. 30, 1993).

The State's failure to prove compliance with the regulation thereby tends to support rather than rebut the evidence indicating a violation of the regulations. State of Maine, 669 F.2d at 831.

c. The Allowability of Profits.

The Grant Officer's response to the State's Motion for Reconsideration suggests that the section of the Final Decision regarding the nonallowability of profits may not be consistent with the Department's interpretation at the time of the underlying audit. Counsel for the Grant Officer refers to a Notice published in the Federal Register eliciting comments from the public regarding, among other things, the question of profits realized through the use of fixed unit cost contracts. [6]

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[4] This section does not appear in the current regulations.

[5] 29 U.S.C. § 1518 (1988).

[6] 53 Fed. Reg. 7989, 7992 (1988).

Although the Notice may be indicative of the Employment and Training Administration's prior uncertainty of how to address problems in the use of fixed unit cost contracts, it does not overcome the plain meaning of the language of the Objectives section of the governing cost principles adopted by the State for its administration of JTPA.

CONCLUSION

A review of the case record in light of the specific objections raised by the State fails to provide any reason for modification or reversal of my December 5, 1994 decision.

The State of Florida, Department of Labor and Employment Security's request for reconsideration IS DENIED.

SO ORDERED.

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Florida Department of Labor and Employment Security v. United States Department of Labor

Case No. : 92-JTP-17

Document : Order Denying Request for Reconsideration

A copy of the above-referenced document was sent to the following persons on JAN 20 1995.

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